



**Decision of the Commissioner for Environmental Information  
on an appeal made under article 12(5) of the European Communities  
(Access to Information on the Environment) Regulations 2007 to 2018  
(the AIE Regulations)**

**Case CEI/19/0055**

**Date of decision:** 5 June 2020

**Appellant:** Mr. X

**Public Authority:** The Department of Agriculture, Food and the Marine (the Department)

**Issue:** Whether the Department was justified in refusing partial access to a document entitled “Felling – Statutory Requirements and Policy Standard Operating Procedure”, otherwise referred to as the “Felling SOP”, under article 8(a)(iv) of the AIE Regulations on the basis of legal professional privilege

**Summary of Commissioner's Decision:** Having carried out a review in accordance with article 12(5) of the AIE Regulations, the Commissioner varied the decision of the Department. He found article 8(a)(iv) of the AIE Regulations applied to certain parts of the redactions made from the Felling SOP document. He found that the Department’s decision to refuse access to other redacted parts of the document was not justified and directed the release of that information.

**Right of Appeal:** A party to this appeal or any other person affected by this decision may appeal to the High Court on a point of law from the decision, as set out in article 13 of the AIE Regulations. Such an appeal must be initiated not later than two months after notice of the decision was given to the person bringing the appeal.

## **Background**

On 3 September 2019, the appellant requested four categories of information relating to the Forest Service's inspection and monitoring procedures. In a belated decision dated 18 October 2019, the Department granted the request in part by releasing ten documents, but it refused access to one document in full under article 8(a)(iv) of the AIE Regulations referencing section 31(1)(a) of the Freedom of Information (FOI) Act 2014, i.e. on the basis of legal professional privilege. This decision followed an apology that issued from the Forestry Division on 4 October 2019 for having previously overlooked the request.

On 23 October 2019, the appellant requested an internal review of the Department's decision to refuse access in full to the document entitled "Felling – Statutory Requirements and Policy Standard Operating Procedure", otherwise referred to as the "Felling SOP", on the grounds that it contains "privileged legal advice". The appellant noted that the Department's decision did not indicate that it took account of article 10(5) of the Regulations, which provides for environmental information to be granted in part where it can be separated from other information that is subject to refusal under article 8 or 9 of the Regulations. He stated: "Taking account of this provision would allow for a redacted version of the document to be provided with the privileged information obscured." On 1 November 2019, the Department varied its original decision by granting access to a redacted version of the Felling SOP document. The appellant appealed to my Office on 18 November 2019.

I have now completed my review under article 12(5) of the Regulations. In carrying out my review, I have had regard to the appellant's submissions and the contents of the Felling SOP document. I have also had regard to: the Guidance document provided by the Minister for the Environment, Community and Local Government on the implementation of the AIE Regulations (the Minister's Guidance); Directive 2003/4/EC (the AIE Directive), upon which the AIE Regulations are based; the 1998 United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention); and The Aarhus Convention—An Implementation Guide (Second edition, June 2014) ('the Aarhus Guide').

I note that on 4 February 2020, my Office invited the Department to make submissions in support of its decision. The Department was given three weeks in which to make a response, i.e. until 25 February 2020, which was before the extraordinary demands arising from the COVID-19 crisis affected the Irish public service. As no submissions have been received to date, I consider it appropriate to bring this matter to conclusion by way of a formal, binding decision based on the information now before me.

### **Preliminary Matter**

In his submissions to this Office, the appellant challenges the Department's internal review decision on the basis that it did not cite any provision of the AIE Regulations and did not discuss how legal privilege protects the redacted parts of the Felling SOP document. However, it is apparent from the appellant's internal review request, as well as from certain comments made in his submissions, that he understood that the relevant refusal ground was article 8(a)(iv) of the Regulations and that the basis for the claim of privilege was that the document contained legal advice. On internal review, the appellant did not dispute that article 8(a)(iv) applied in part to the document; rather, he indicated that he sought a redacted version of the document "with the privileged information obscured". The Department, in turn, granted partial access to the Felling SOP document. In the circumstances, I do not consider that the Department was required to clarify that its decision to refuse access to the redacted parts of the document was based on article 8(a)(iv) of the Regulations in reference to section 31(1)(a) of the FOI Act because it considered the redactions to contain privileged legal advice.

### **Scope of Review**

My review in this case is concerned solely with the question of whether the Department was justified in refusing access to the redacted parts of the Felling SOP document under article 8(a)(iv) of the Regulations on the basis of legal professional privilege. For the sake of clarity, I note that it is not in dispute that the Felling SOP document qualifies as environmental information within the meaning of the Regulations and the Directive.

### **Analysis and Findings**

The grounds for refusal of a request for environmental information are set out in articles 8 and 9 of the AIE Regulations, but any proposed refusal is subject to the provisions of article 10 of the Regulations. In this case, it is relevant to note that article 10(3) requires public authorities to consider each request on an individual basis and to weigh the public interest served by disclosure against the interest served by refusal. In addition, article 10(4) provides that the grounds for refusal of a request shall be interpreted on a restrictive basis having regard to the public interest. I take article 10(4) to mean, in line with the Minister's Guidance, that there is generally a presumption in favour of the release of environmental information. Moreover, as indicated above, article 10(5) clarifies that a request should be granted in part where environmental information may be separated from other information to which article 8 or 9 applies.

Article 8(a)(iv) provides that a public authority shall not make available environmental information where disclosure of the information would adversely affect the confidentiality of the proceedings of public authorities, where such confidentiality is otherwise protected by law (including the FOI Acts 1997 and 2003 with respect to exempt records within the

meaning of those Acts). The appellant contends that, as the SOP is an operating procedure, it has no apparent relationship with any “proceedings” within the meaning of article 8(a)(iv). He also states:

“[T]he FOI Act does not create an obligation of confidentiality since it is in fact legislation designed to give wide access to records held by or for public bodies. It is a common mistake of public authorities to try and read in FOI exemptions into the AIE Directives but it is an incorrect interpretation of the law in this regard.”

I have accepted in numerous previous cases that article 8(a)(iv) effectively imports the exemptions under the FOI Act into the consideration of whether the confidentiality of proceedings of public authorities is otherwise protected by law, and I find no reason to depart from this approach. As I observed in [Case CEI/18/0029](#) (Right to Know CLG and The Department of Culture, Heritage and the Gaeltacht), it does not appear that the incorporation of exceptions or exemptions contained in freedom of information legislation is considered by the Court of Justice of the European Union (CJEU) to be incompatible with the AIE Directive. Moreover, the CJEU indicated in Case C-204/09 *Flachglas Torgau GmbH v Federal Republic of Germany*, available [here](#), that even a rule providing generally that the confidentiality of the proceedings of public authorities is a ground for refusing access to environmental information held by those authorities may be sufficient for the purposes of Article 4(2)(a) of the AIE Directive, provided that the concept of “proceedings” is clearly defined under national law.

As noted by the Aarhus Guide, the Aarhus Convention does not define “proceedings of public authorities”. The Guide states:

“[O]ne interpretation is that these may be proceedings concerning the internal operations of a public authority and not substantive proceedings conducted by the public authority in its area of competence.”

The Aarhus Convention Compliance Committee (ACCC) clarified in its report on Communication [ACCC/C/2010/51](#) (Romania), adopted on 28 March 2014, that not all actions of public authorities may qualify as “proceedings”, because it considers that the term relates to “concrete events such as meetings or conferences”.

The FOI Act does not provide generally for the confidentiality of all actions or internal operations of public authorities, of course. Rather, it authorises the disclosure of official information unless the specified conditions of the relevant exemption provisions are met. The FOI Act also specifies, in pertinent part, that no right of access applies to an exempt record where the exemption is mandatory. I therefore find no basis for concluding that the

incorporation of the FOI Act exemptions into the AIE Regulations is itself incompatible with either the Directive or the Convention.

In any event, the doctrine of legal professional privilege derives from the common law. As my predecessor described it as far back as 2008 in [Case CEI/08/0001](#) (HoA Action Group and Kildare County Council), it is a common law rule that was incorporated into the FOI Act. What this means is that the common law already provided for the confidentiality of information that meets the test for legal professional privilege. The Oireachtas recognised the privilege and effectively codified it when it enacted the FOI Act by providing an exemption for records that would be exempt from production in proceedings in a court on the ground of legal professional privilege.

Thus, I accept that legal professional privilege is the type of claim for confidentiality that is protected by law as envisioned in article 8(a)(iv), with or without reference to the FOI Act. It enables a client to maintain the confidentiality of two types of communication:

- a) confidential communications made between the client and his/her professional legal adviser for the purpose of obtaining and/or giving legal advice (advice privilege); and
- b) confidential communications made between the client and a professional legal adviser or the professional legal adviser and a third party or between the client and a third party, the dominant purpose of which is the preparation for contemplated/pending litigation (litigation privilege).

It follows that the relevant “proceedings” may be viewed as the legal proceedings or “concrete events” giving rise to the privilege, such as engaging in a continuum of communications with legal advisers for the purpose of obtaining and/or giving legal advice. I do not consider that actual court proceedings relevant to the legal advice must be in existence in order for article 8(a)(iv) to apply. As I stated in [Case CEI/17/0046](#) (Mr Y and Kilkenny County Council) in relation to legal advice privilege: “The privilege ‘belongs’ to the client and there is no requirement for litigation to be in train or anticipated. The concept of ‘once privileged always privileged’ applies where privilege is based on advice privilege and thus, unless otherwise lost or waived, legal advice privilege lasts indefinitely.”

The Felling SOP document at the centre of this review is a draft internal procedures document. The inside cover page of the redacted version that was made available to the appellant includes a note that states: “This document contains privileged legal advice and references thereto and should not be disclosed to any third party, whether under Freedom of Information Acts or otherwise, without prior consultation with the Legal Services Division.” My examination of the redactions confirms that certain parts of the document directly restate legal advice received from the Legal Services Division in relation to the rules and requirements governing forestry and in particular felling. The relevant passages are the following:

- Page 2: redaction beginning with “Legal Services has advised”;
- Pages 9-10: “Felling Section sought advice from Legal Services Division . . . any conviction.”
- Pages 12-14: all redacted information, i.e. the request to and response from Legal Services Division;
- Page 16: “Can the ... “ to end of page;
- Pages 27-29: all redacted information, i.e. the advice received from Legal Services Division.

I am satisfied that the passages identified above are protected by legal advice privilege.

The remaining redactions do not include any direct reference to legal advice or the Legal Services Division. In the absence of any submission from the Department, I do not find a sufficient basis for concluding that these redactions qualify for legal professional privilege. Moreover, no arguments have been made to advance any additional grounds for refusal. I am therefore not satisfied that the Department’s decision to refuse access to the remaining redactions was justified and find that further parts of the Felling SOP document should be released accordingly.

In weighing the public interest served by disclosure of the redactions protected by legal advice privilege against the interest served by refusal, I note the AIE regime recognises a very strong public interest in maximising openness in relation to environmental matters so that an informed public can participate more effectively in environmental decision-making. In this case, disclosure would enhance transparency by providing further insight into the Forest Service’s understanding of the rules and requirements that it is responsible for implementing and enforcing in relation to the felling of trees. This is particularly important given the fact that Ireland remains the least forested country in the European Union, as the Department’s own website acknowledges.

On the other hand, I recognise that legal professional privilege is regarded as a cornerstone of the administration of justice. In [Martin & Doorley v. Legal Aid Board \[2007\] 2 IEHC 76](#), for example, the High Court held that “legal professional privilege exists and has been elevated beyond a mere rule of evidence to ‘a fundamental condition on which the administration of justice as a whole rests’”. Accordingly, I consider that there would have to be exceptional public interest factors at play, in favour of disclosure, before legal professional privilege could be set aside. In this case, the Department has already released a large amount of information regarding the Forest Service’s inspection and monitoring procedures, and further parts of the Felling SOP document fall to be released as a result of this decision. Additional information about the Forest Service’s role in relation to the control of felling is available on the Department’s website:

<https://www.agriculture.gov.ie/forestservice/forestservicegeneralinformation/abouttheforestservice/>. I therefore consider that the public interest in openness and transparency has

been served to a large extent. In the circumstances, I am satisfied that the public interest served by disclosure of the information protected by legal professional privilege does not outweigh the interest served by refusal and that article 8(a)(iv) applies the relevant passages identified above.

### **Decision**

Having carried out a review under article 12(5) of the AIE Regulations, I vary the Department's decision in this case on the basis that article 8(a)(iv) applies to certain parts of the redactions made from the Felling SOP document, as identified above, but that the refusal of access to the other redacted information was not justified. I therefore direct the release of the remaining parts of the Felling SOP document.

### **Appeal to the High Court**

A party to the appeal or any other person affected by this decision may appeal to the High Court on a point of law from the decision. Such an appeal must be initiated not later than two months after notice of the decision was given to the person bringing the appeal.

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**Peter Tyndall**  
**Commissioner for Environmental Information**  
**5 June 2020**

